The words in italics were said by the judge near the end of his summing-up and following as they did the judge's firm expression of opinion that the accused, if he fired the shots, had the state of mind necessary to constitute the offence of murder, they may have led the jury to conclude that in substance the only issue for them was whether the accused fired the shots.

In their Lordships' view this amounted to a misdirection of such a character that the conviction cannot be allowed to stand.

Two further grounds were put forward on behalf of the appellant. It was argued that the learned judge was wrong in not leaving the offence of culpable homicide to the jury. If the act causing death is done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, it comes within the third limb of section 300 and the offence is murder. If the act is done with the intention of causing bodily injury likely to cause death and it is not shown that the accused knew that that was the likely consequence, it is culpable homicide. It is not possible to define with precision the meaning to be given to the word "likely" but the contrast between the use of that word in section 299 and the words in the third limb of section 300 indicates that a higher degree of certainty is required to justify conviction under that limb for murder. In this case although the judge did tell the jury that they had to consider the third part of section 300, his direction was such as to amount to a direction that that part of section 300 did not apply. Where the question whether a case comes within this part of section 300 is in reality left to a jury, it is difficult to envisage a case in which reference ought not to be made to section 299 and to the contrast between the word "likely" in that section and the words "sufficient in the ordinary course of nature" in section 300, and it is also difficult to envisage a case in which it would not be right to leave the question of a verdict of culpable homicide to the jury.

The third ground of appeal was with regard to the cross-examination to which the accused was subjected. While some criticism can properly be made of that, it is not of such a character that in their Lordships' view it would be right to quash the conviction on this ground.

Their Lordships were invited to dismiss the appeal on the ground that no substantial miscarriage of justice had occurred. By the proviso to section 60(1) of the Courts of Judicature Act 1964 the Federal Court is given power to take that course notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant if it considers that no substantial miscarriage of justice has occurred.

In *Woolmington* v. *Director of Prosecutions* [1] Lord Sankey L.C. said at p. 482 in relation to the similar provision in the Criminal Appeal Act 1907 that the test was whether "if the jury had been properly directed they would inevitably have come to the same conclusion." In *Stirland* v. *Director of Prosecutions* [2] Lord Simon at p. 321 said that the provision assumed "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

On the simple facts of this case it might well be said that a reasonable jury properly directed would inevitably and without doubt have reached the conclusion that the person who fired the shots was guilty of murder. Their Lordships cannot, however, disregard the fact that the learned judge who heard the evidence formed the view that the accused's intention was only to shoot the deceased in the forearm. They are unable therefore to exclude the possibility that a reasonable jury properly directed would have reached the same conclusion, and, if it had, the possibility that it would not have concluded that the accused knew that the shots at the deceased's forearm were so imminently dangerous that they must in all probability cause death or such bodily injury as was likely to cause death or that the injury intended was sufficient in the ordinary course of nature to cause death. Their Lordships are therefore unable to apply the proviso.

On any view of the evidence the appellant was guilty of culpable homicide.

For the reasons stated their Lordships allowed the appeal and set aside the verdict of guilty of murder and quashed the sentence of death passed on the appellant and substituted therefor a verdict of guilty of culpable homicide and a sentence of imprisonment for life.

Appeal allowed.

Solicitors: *Speechly, Mumford & Soames; Stephenson Harwood & Tatham.*

ALAGAPPA CHETTIAR v. PALANIVELPILLAI & ORS.

[O.C.J. (Raja Azlan Shah J.) November 26, 1966]

[K.L. — Civil Suit No. 1024 of 1966]

Arbitration — Arbitration Ordinance, 1950, s. 5 — Requirements to satisfy court — Onus of party wanting to keep out of arbitration — Subsequent agreement not covered by arbitration clause.

Landlord and Tenant — Breach of covenant to keep in repair — Standard rent of controlled premises.

The plaintiff was the trustee of rent-controlled premises of which the defendants, trustees of a Hindu temple, were statutory tenants. Under a lease and a subsequent agreement the defendants' predecessors had covenanted with the plaintiff's predecessors to keep the premises in good and tenantable condition and to paint and white-wash the said premises from time to time and when appropriate. In February 1965 the defendants

gave notice to determine the tenancy with effect from January 31, 1965, but vacant possession was not delivered until August 1965. The plaintiff brought an action claiming double rent for the period February 1965 to August 1965, damages for breach of covenants and other consequential reliefs. The defendants made this application to stay the proceedings in the action and send all the matters in dispute to arbitration under section 5 of the Arbitration Ordinance, 1950 on the ground that the matters in dispute were within the scope of an arbitration clause in the lease.

The plaintiff opposed the application on the grounds that the terms of the arbitration clause were not wide enough to cover all the issues in the action and that the subsequent agreement was entered into after the execution of the lease and therefore could not come within the scope of the arbitration clause.

Held: (1) once a party had brought itself within section 5 of the Arbitration Ordinance, which the defendants had done in this case, the other party should discharge the onus of satisfying the court that there were good grounds for the case to proceed, subject to an over-riding discretion in the matter to be exercised according to the varying nature of the different cases presented to it;

(2) questions as to the standard rent of the premises, an issue which the defendants intended to raise, were within the exclusive jurisdiction of the Rent Assessment Board. A dispute such as this would therefore not be rightly left to an arbitrator;

(3) as the scope of the arbitration clause extended only to matters under or in connection with the lease and as the suit involved matters under the subsequent agreement it would not be reasonable to refer the case to an arbitrator who could only deal with questions arising under the lease and would not be competent to deal with other question arising under the subsequent agreement;

(4) in the circumstances there were good reasons for not staying the action and in the exercise of the court's discretion the matter ought not to be referred to arbitration.

Cases referred to:—

(1) *Vawdrey* v. *Simpson* [1891] 1 Ch. 166.

(2) *Heyman & Anor.* v. *Darwins Ltd.* [1942] 1 All E.R. 337, 355.

(3) *Turnock* v. *Sartoris* (1889), 43 Ch. D. 150.

CIVIL SUIT.

S. D. K. Peddie for the plaintiff.

A. D. Rajah for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by the defendants (the present trustees of the Sri Maha Mariamman Temple) to stay the proceedings in this action and send all the matters in dispute and which are alleged in the claim to arbitration under section 5 of the Arbitration Ordinance, 1950.

The plaintiff's case is simple and does not require elaborate discussion. In 1948 his predecessor in title leased to the defendants' predecessors a piece of land with a building (rent-controlled) on it as trustees of the said temple for a fixed period. The lease contained, *inter alia*, a covenant to keep the said building and other fixtures in good and tenantable repair and condition and the terms of the lease are binding upon the successors in title of both parties. The original rent was $355 per month but the lease was renewed from time to time and at the time material to the present action the rent had been increased to $533.87. Sometime in 1957, the plaintiff determined the lease and thereafter the defendants' predecessors remained in possession as statutory tenants. It was in that year that the defendants' predecessors entered into a fresh agreement with the plaintiff's predecessor and covenanted, among other things, to paint and white-wash the said building from time to time and when appropriate. The plaintiff now alleged that the defendants or their predecessors had failed to perform and observe the aforesaid covenants under the lease and the subsequent agreement. In February 1965 the fifth defendant as chairman of the said temple gave notice to determine the tenancy with effect from 31st January 1965, but vacant possession was not delivered until August 1965. The plaintiff accordingly issued a writ claiming double rent for the period February 1965 to August 1965, damages for breach of covenants, and other consequential reliefs. The defendants, the present trustees of the temple, made an application to stay the action and send the matters in dispute to arbitration under section 5 of the Arbitration Ordinance, 1950. They say that the matters in dispute are within the scope of an arbitration clause which is in these terms:—

> "3. (e) If any dispute or difference shall arise between the Lessor and the Lessee touching any clause matter or thing whatsoever herein contained or the operation or construction thereof or any matter or thing in any way connected with the lease of the rights duties or liabilities of either party under or in connection with this lease, then and in every such case the dispute or difference shall be referred to a single arbitrator in case the parties agree upon one and otherwise by two arbitrators one to be appointed by each party and in either case in accordance with and subject to the provisions of the 'Arbitration Enactment' or any statutory modification thereof for the time being in force."

In order to bring themselves within the provisions of section 5 of the Ordinance (in substance the same as section 4 of the English Arbitration Act, 1889) they have to satisfy the court that the matters in dispute and the differences in the present action arose out of the said lease and are matters within the scope of the arbitration agreement; that there is no sufficient reason why the said matters should not be referred to arbitration in accordance with the agreement; that the application was made by a party to the agreement or by some person claiming through or under such a party; that they have not taken any further step in the present action beyond entering appearance; and that at the time when the action was commenced they were and still remain ready and willing to do all things necessary to the proper conduct of the arbitration. They therefore filed an affidavit

in which they deposed all the five conditions as required by the section. That being so, it is now on the party, that is the plaintiff, who wants to keep out of arbitration to satisfy the court that there are good grounds for the case to proceed: see 2 *Halsbury's* Laws of England (3rd edn.), para. 55, page 24. However, the court has an over-riding discretion in the matter "to be exercised according to the varying nature of the different cases presented to it." (See *Vawdrey* v. *Simpson* [1] at page 169, *per* Chitty J.). Lord Macmillan in his speech in the House of Lords in *Heyman & Anor.* v. *Darwins Ltd.* [2] posed the matter in this way:—

"The Arbitration Act, 1889, section 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not *ex debito justitiae*. Though the dispute is clearly within the arbitration clause, the court 'may' still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under section 4, always subject to the discretion of the court."

Applying the section and treating the onus as lying upon the plaintiff, the question arises as to whether he has discharged that onus and shown a good reason why the arbitration should not take place. The plaintiff put in an affidavit deposing that sufficient grounds exist for keeping the action out of arbitration. He contends, among other things which are not necessary to determine, that assuming the arbitration clause is applicable (which is denied), the terms of submission are not wide enough to cover all the issues raised or likely to be raised in the present action. In particular, he contends that the defendants have in two of their letters indicated their intention to raise questions as to the standard rent of the said premises and are accordingly questions within the exclusive jurisdiction of the Rent Assessment Board as established under the Control of Rent Ordinance from time to time in force. I accept the validity of that argument. It is clearly within the exclusive jurisdiction of the Rent Assessment Board to determine issues in respect of standard rent of premises under the Ordinance and I should not think it right to leave a dispute such as this to an arbitrator where the determination of a dispute by him would necessarily imply that he can have no jurisdiction.

An additional reason put up by the plaintiff is that the second covenant under the agreement was entered into by the defendants after the execution of the lease and therefore does not come within the scope of the arbitration clause. He therefore contends (although that is denied) that the first covenant under the lease comes within the jurisdiction of the arbitrator while the second covenant does not. In such a case he says that it is not right to split the litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere. It may be recalled that one ground of the plaintiff's action is for damages for alleged breach of both the covenants under the lease and the subsequent agreement. I am of the view that the agreement of 1957 cannot be read as part of the agreement contained in the lease, but was a subsequent agreement entered into between the parties and imposing upon the defendants certain fresh liabilities. A close examination of the arbitration clause reveals that the scope of the reference to arbitration extends only to matters "under or in connection with this lease," and that, to my mind, simply refers to matters arising under the lease alone and does not include matters arising under the subsequent agreement. In the circumstances I do not think it would be rational to cut up the litigation into two distinct actions, one to be referred to arbitration and the other to be adjudicated upon. Even if the arbitration clause were to be construed so as to include all matters arising or which might arise under the subsequent agreement, I should not think it right to refer the case to arbitration because there may be questions arising as to the construction of the agreement and its effect upon the provisions of the lease, and these questions would not come within the powers of the arbitrator. In the circumstances it would not be reasonable to refer the case to the arbitrator who could only deal with questions arising under the lease and would not be competent to deal with other questions arising under the subsequent agreement. (See *Turnock* v. *Sartoris* [3]).

Reviewing the case as a whole, I am satisfied that there are good reasons for not staying the action, and that the plaintiff has discharged the onus which is placed upon him, and I therefore exercise my discretion in holding that the matter ought not to be referred to arbitration.

The defendants' application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Lovelace & Hastings.*

CHAY HON SONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi C.J. (Malaya)) November 28, 1966]

[K.L. — Criminal Appeal No. 86 of 1966]

Evidence — Burden of Proof — Sufficient if reasonable doubt raised by accused — Whether name in baptism certificate referred to appellant — National Service Ordinance, 1952, s. 5(2).

National Service — Failure to present for registration — Benefit of the doubt — National Service Ordinance, 1952, s. 5(1) & (2).

The appellant was convicted on a charge of failing without lawful excuse to register for national service,